No. 722 (64)



IN THE

# Supreme Court of The United States

OCTOBER TERM, 1944

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MRS. PAULINE P. WEIL, E. J. STERN, AND M. E. KILPATRICK, AS EXECUTORS OF THE ESTATE OF J. B. WEIL, DECEASED,

*Petitioners.*

*v.*

COMMISSIONER OF INTERNAL REVENUE

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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IN THE

# Supreme Court of The United States

OCTOBER TERM, 1944

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| MRS. PAULINE P. WEIL, E. J. STERN, AND M. E. KILPATRICK, AS EXECUTORS OF THE ESTATE OF J. B. WEIL, DECEASED,<br>*v.*<br>COMMISSIONER OF INTERNAL REVENUE. | **PETITION FOR A WRIT OF CERTIORARI.** |

## PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The petitioners, Mrs. Pauline P. Weil, E. J. Stern, and M. E. Kilpatrick, as executors of the estate of J. B. Weil, deceased, respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Sixth Circuit, to review a final judgment of that court, entered on the 18th day of October, 1944, whereby that Court affirmed the judgment of the Tax Court of the United States in a consolidated cause entitled, Estate of J. B. Weil, Deceased, et al v. Commissioner of Internal Revenue; Commissioner of Internal Revenue v. Estate of J. B. Weil, Deceased, et al, the consolidated cause being numbered 9732, 9733 in the said United States Circuit Court of Appeals for the Sixth Circuit. The judgment of the Circuit Court of Appeals is reported in *C. C. H. Standard Federal Reports 1944 §9492.* It is not yet published in the Second Federal Reporter.

## STATEMENT OF MATTER INVOLVED.

The consolidated cause involved petitions for review both by the taxpayer and by the commissioner. The judgment of the Tax Court of the United States was affirmed on both petitions for review. The case presented a consolidated record for the two petitions. The questions involved however are wholly different, and the statement here presented will be confined throughout to the statement of the matters involved in the taxpayer's petition for review with respect to which the writ of certiorari is prayed.

J. B. Weil in his lifetime executed a trust indenture to himself as trustee whereby he conveyed certain stock to be held in trust for his daughter, Pauline Weil, and with certain future interests; the details to be stated later.

The Commissioner of Internal Revenue undertook to treat the income of this trust for the years 1934, 1935, 1936, and 1937 as the personal income of Weil, and assessed a tax against him based on that determination. The Tax Court sustained the Commissioner's action. For the years 1934 and 1935 the action of the Tax Court was based on *Helvering v. Stuart, 317 U. S. 154.* This part of the case is no longer of importance because of the statute working a retroactive repeal of the *Stuart* ruling. (*§167 of the Internal Revenue Code* as amended by ¶134 of the *Revenue Act of 1943*).

As to the years 1936 and 1937 the Tax Court held the income taxable to the grantor under *Clifford v. Helvering*, 309 U. S. 331. The difference between these two years and the years 1934 and 1935 arose out of the fact that in December, 1935 Weil had surrendered by an instrument in writing all right to use any part of the income from the trust for the support of his minor daughter.

The crucial question, therefore, and the one to which this petition for certiorari is addressed, is whether the

Tax Court and the Circuit Court of Appeals correctly applied the doctrine of the *Clifford* case to the trust involved in the case at bar. As will be pointed out later, the ruling here involved is directly in conflict with rulings in other Circuits.

The Circuit Court of Appeals rendered a brief opinion which adopted in toto the opinion of the Tax Court, merely saying that the judgment was "affirmed for the reasons stated in its memorandum findings of fact and opinion." The effect of this is to make the opinion of the Tax Court the opinion of the Circuit Court of Appeals, and it undoubtedly will be so treated by the bar when this case is considered as a precedent.

## NATURE OF THE TRUST.

The trust indenture is in the record, beginning at page 20. The instrument whereby Weil surrendered the right to use any part of the trust income for the support and maintenance of his daughter is printed in the record, commencing at page 24. The two documents are perfectly clear and there appears to be no differnece of opinion as to their construction. So far as relevant to the immediate problem, the trust presents these features:

(a) The grantor is the trustee and is given wide powers of management of the trust.

(b) The trust is for the benefit of the grantor's daughter for life, with remainder to her children, if any, at the time of her death; if no children, then to the grantor's wife; if the grantor's daughter dies without leaving children, and without the grantor's wife being then in life, the corpus goes to a charity to be named by the trustee, but with the proviso that if the grantor is still the trustee he shall not have the power to name the charity but the same shall be named by one of two named men if living, if not by the Judge of the Probate Court in Davidson County, Tennessee.

(c) The grantor reserves no right to revoke the trust or to modify or change it in any way, or to recapture the assets.

The situation created by these instruments, therefore, may be summarized as follows: The grantor was the trustee and possessed of the powers of management, but under no circumstances and in no event could he obtain any economic benefit to himself from either the income or the corpus of the trust, nor could he under any circumstances or in any event alter in any way the disposition of the trust income or the trust corpus. So carefully does the trust instrument provide for this latter point that in the event the corpus ultimately goes to a charity, it is nevertheless provided that if the grantor is still the trustee at that time he shall not have the authority to name the charity but the same shall be named by others, as heretofore set out.

Inasmuch as the opinion of the Tax Court, which as stated was adopted in toto by the Circuit Court of Appeals, refers to "loose handling" of the trust, a brief statement should be made as to just what the record shows is here meant, namely: Weil had the practice in his own affairs of doing all his banking through the bank account of the Coca-Cola Bottling Works, and of having all of his personal bookkeeping done through the books of that Company. When this trust was created its banking and bookkeeping was similarly handled. In 1935, while Weil was ill in England, the bookkeeper for the Coca-Cola Bottling Works charged certain of Weil's personal expenses to the trust account. On Weil's return in 1936 and his discovery of this fact, these entries were all corrected and a correct settlement made with the trust eliminating these incorrect charges. The evidence is undisputed that Weil never at any time used any of the trust income for himself or his wife or his daughter, or to discharge any of his obligations. In 1937, before any tax questions had been raised, separate trust accounts were set up, and separate books were kept.

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## JURISDICTION OF THE SUPREME COURT.

Jurisdiction is given to the Supreme Court of the United States to grant a writ of certiorari to review a decision of a United States Circuit Court of Appeals. *U. S. C. A. Title 28*, §*347*.

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## QUESTIONS PRESENTED.

The following questions are presented in this case:

1. Does the rule in the *Clifford* case make the income of a trust taxable to the grantor where he is trustee with large powers of management, but where under no circumstances and in no event can he at any time gain any economic benefit from the income or corpus of the trust, and where there is no reversion to him and he cannot under any circumstances revoke the trust or change or alter in any way the disposition of the income or of the corpus? The Tax Court and the Circuit Court of Appeals have answered this question "yes". Other Circuit Courts of Appeals, as will hereinafter be pointed out, haven given a directly contrary answer.

2. If the issue of whether a grantor of a trust retains so substantially the incidents of ownership as to be taxable with the income is ordinarily a question of fact (*Dodson v. Commissioner*, *320 U. S. 489*), do the facts outlined in the foregoing question, when uncontradicted in the record, make a case where a determination of such issue adverse to the taxpayer should be held to be without "a rational basis" in the record so that such determination constitutes an error of law?

3. In a situation such as outlined in the question numbered one, is the taxability of such income to the grantor affected by errors in bookkeeping which occurred without his knowledge or consent and were promptly corrected before any tax issues arose?

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) The decision here sought to be reviewed determined important questions of Federal law relative to the application of the Federal Revenue Statutes, which questions have not been definitely settled by decisions of this Court, namely:

(a) Under the doctrine of the *Clifford* case, is the income of a trust taxable to a grantor because he is the trustee with broad powers of management, even though he can never realize any economic benefit from the trust or revoke or modify it in any way, and has no right of reversion to himself under any circumstances, and cannot change in any way any of the beneficiaries of the income or of the corpus? There are hundreds and possibly thousands of trusts in this country in this situation. It is a normal way for a father to make a gift in trust to his children. No other court has ever held the income under such circumstances taxable to the grantor. Certainly the *Clifford* case does not so hold, since that case expressly rests on the fact that the arrangement there considered was a mere temporary re-allocation of income within a family group. Here the gift of income and corpus, throughout all its possible limitations over, is not temporary but permanent. The control in this respect is completely separated from the grantor and can never be re-taken by him. The startling result of this case, as well as the great importance of the question involved, justify the granting of the writ.

(b) Where the terms and provisions of a trust are in writing and all of the facts are undisputed and the situation presented with respect to such a trust is that outlined in the foregoing question, is a decision of the Tax Court that the income from such a trust was in reality the income of the grantor one

without "rational basis" in the record and hence error of law? It is submitted in this connection that there is no rational basis for saying a grantor had retained in fact the incidents of ownership of property, where without dispute he had irrevocably separated himself from any economic benefit from the property, and from any right ever to re-take any part of the income or corpus, or ever to change the disposition of the income or corpus.

(c) In a situation such as above outlined is the result changed because of carelessness and errors in bookkeeping which were corrected, and which worked no diversion of either the income or the corpus and resulted in no economic benefit to the grantor? Before this case no court has ever suggested anything of the kind. This is an entirely different question from that which would arise if the actual handling of the trust was such as to show that the whole trust was fictitious and unreal. Nothing of this kind is suggested by the record in this case, nor is anything of the kind found by the tax court or by the circuit court of appeals. The view actually taken by the court is novel and introduces an entirely new idea in tax law which it is important for this Court to settle.

(2) There is a direct conflict between the present decision and the decisions of other circuits.

(a) On the question as to whether the income of a trust of this kind is taxable to the grantor, the present case is directly in conflict with the decision of the Tenth Circuit in *Armstrong v. Commissioner, 143 F. 2d 700.* The two cases involve the same question and completely contradictory results are reached by the two circuits. The present case is also in effect in conflict with the decisions of the First Circuit in *Commissioner v. Branch, 114 F. 2d 985;* and *Plimpton v. Commissioner, 135 F. 2d 482;* and with the decision of the Second Circuit in *Phipps v. Commissioner, 137 F. 2d 141.* In view

of the frequency with which a trust of this character may be involved in a similar issue it is important that this conflict be resolved authoritatively by this Court.

(b) Insofar as the decision of the circuit court of appeals may be construed as meaning that the decision of the tax court, if treated as a finding of fact, has under these circumstances a rational basis in the record, and hence is binding upon the reviewing court, it is in conflict with the decision of the Tenth Circuit in *Armstrong v. Commissioner, 143 F. 2d 700*; and the decision of the Second Circuit in *Phipps v. Commissioner, 137 F. 2d 141*; and the decision of the First Circuit in *Plimpton v. Commissioner, 135 F. 2d 482*. The effect of these decisions is that under such undisputed state of facts as has been outlined, no conclusion is legally possible except that the income of such a trust is not taxable to the grantor, and hence that a decision to the contrary is error of law. As heretofore pointed out, the question here involved is one that will necessarily arise frequently and the conflict of decisions in this respect should be resolved.

WHEREFORE, petitioners pray that the writ of certiorari issue to the United States Circuit Court of Appeals for the Sixth Circuit to review the judgment herein referred to, and that upon said review the said judgment be reversed.

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BERTRAM S. BOLEY,

*Attorneys for Petitioners.*

## BRIEF

The question here presented undoubtedly affects hundreds and perhaps thousands of similar trusts throughout the country. A parent wishing to make gifts to minor children could normally do so by the creation of a trust, and in the vast majority of instances the parent would ordinarily make himself trustee. The details of such trusts would disclose many varying features; but where the gift is genuine the donor would, as here, retain no economic benefits and no right of reversion or disposition with respect to either income or corpus; but would normally retain as trustee the responsibility for management. The fact that a trust of this type is an entirely normal way for a father to create a trust where he wishes to make a gift to a child, has been pointed out by the Tenth Circuit in *Armstrong v. Commissioner, 143 F. 2d 700*, from which we quota infra.

The question therefore of whether such a trust is within the *Clifford* doctrine, so as to make the income taxable to the grantor, is one which could arise many times. In view of the decisions of the Tax Court and of the Circuit Court of Appeals in the present case, we may feel certain that the question not only could arise but will arise may times.

The Bureau of Internal Revenue has now obtained the sanction of a Circuit Court of Appeals for taxing the income of such a trust to the grantor. The Bureau will, of course, not rest content in taxing only one trust but will beyond any question seek to apply this ruling to many trusts. With this decision now established as a part of our jurisprudence, it probably would be the duty of the Bureau to seek to apply the ruling to all similar trusts. Taxpayers, however, would not acquiesce in such a course by the Bureau, because as pointed out in the foregoing petition such taxpayers in contesting the taxability of the income to grantors under such circumstances would have the support of decisions of the Tenth Circuit and of the Second Circuit and of the First Circuit

in the cases pointed out in the foregoing petition. Hence the importance of this Court settling the question.

It is believed that there is no real problem in the instant case as to whether the taxability of the income of a trust to the grantor is ordinarily a question of law or a question of fact. Here all the facts are undisputed. There are no disputed inferences to be drawn from the facts relative to what incidents of ownership, if any, the grantor retained or did not retain. If our view of the law is correct, the conclusion of the Tax Court cannot be sustained even if it is the type of conclusion which is ordinarily a finding of fact, because such finding would be without substantial support in the record.

We now point out that the decision of the Tax Court could only have arisen from a total misconception of the principle on which *Clifford v. Helvering, 309 U. S. 331* was decided.

A few statements from the *Clifford* opinion make clear the ruling made by this Court. It was a case in which "the benefits directly or indirectly retained blended so imperceptibly with the normal concepts of full ownership." The Court summarized the situation by saying: "We have at best a temporary re-allocation of income within an intimate family group." It was a situation in which the "respondent retained the substance of full enjoyment of all the rights which previously he had in the property."

Briefly, the situation was a mere temporary arrangement, terminating very shortly, with a complete reversion of absolute ownership to the grantor and a complete control of the property in the interim. What the grantor had effected was merely "a temporary re-allocation of income."

In such a situation the conclusion that the grantor remained in substance the owner was a logical conclusion and one, therefore, that an appellate court could not reverse.

An entirely different situation is here presented. Here the allocation of income and corpus is not temporary but permanent. The grantor has parted with all essential incidents of ownership. The most essential of these is, of course, the right to direct who should receive the income and the corpus. According to the *Clifford* doctrine a mere temporary allocation of such income is not the equivalent of parting with the permanent right to control the same. This conclusion, of course, is logical; but the rule there announced can have no possible application to a situation where a grantor has permanently and beyond the power of revocation surrendered all control or direction over both income and corpus; has forever barred himself of the right to re-take either income or corpus, or to change in any way the beneficiary thereof; and has forever surrendered the possibility of any economic benefit to himself from the properties passing into the trust. To say in such a situation that he has retained the substantial incidents of ownership is without the slightest foundation in reason and has no support in a record of this kind. The conclusion of the Circuit Court of Appeals therefore that the income was taxable to the grantor could only have resulted from a complete legal mistake as to the meaning and effect of the *Clifford* case.

Our position is in accord with the decisions of all Circuit Courts of Appeals that have passed upon the matter except the Sixth Circuit.

*Armstrong v. Commissioner, 143 F. 2d 700*, is on its facts directly in point. The Tax Court held the income taxable to the grantor of the trust. The Tenth Circuit reversed the holding, saying among other things:

> "It is our conclusion that petitioner divested himself of all economic benefit or interest in the trust estate or in the income therefrom, and that he was not in any sense the owner of the trust estate. To hold otherwise would be to say that a father cannot by deed of trust, no matter how absolute, give property to a child if he himself is the trustee and

retains absolute control and management for the benefit of the estate."

The Tenth Circuit, in an earlier case of *Jones v. Norris, 122 F. 2d 6*, has rendered a decision to the same effect, from which we quote:

> "We do not understand that the power of management, however unlimited, may operate to bring the grantor within sweeping provisions of §22(a), if by such powers he cannot derive any economic benefit therefrom, except whatever advantages he may gain by virtue of the provisions in the Revenue Act, which permits the creation of trusts and imposes taxation under §161 et seq."
>
> * * * * * * * * * * * * * * * * * * * * * *
>
> "Aside from the weight to be accorded the findings of fact below, *Helvering v. Clifford*, supra, and *Commissioner of Internal Revenue v. Branch*, supra, our own appraisal of the facts leads irresistibly to the conclusion that the grantor retained neither the power to revoke, revest or revert either the corpus or the income. Absent these essential elements there can be no substantial incidents or attributes of ownership, sufficient to vest in the grantor any of the economic benefits of the trust, essential to taxation under either Section 22(a) or Sections 166 and 167 of the Revenue Act of 1934."

The First Circuit, in *Commissioner v. Branch, 114 F. 2d 985*, dealt with a case where the grantor as co-trustee had broad administrative powers, but retained no right to designate beneficiaries and no right of reversion except in the event he outlived his wife. The court held the income not taxable to the grantor, saying:

> "Where the grantor has stripped himself of all command over the income for an indefinite period, and in all probability, under the terms of the trust instrument, will never regain beneficial ownership of the corpus, there seems to be no statutory basis for treating the income as that of the grantor under

Section 22 (a) merely because he has made himself trustee with broad powers in that capacity to manage the trust estate."

The Second Circuit, in *Phipps v. Commissioner, 137 F. 2d 141*, with regard to a long time trust where the grantor retained at least some discretion as to the disposition of the income, refused to sustain the Tax Court in taxing the income to the grantor, saying among other things:

> "Nevertheless, we cannot agree with the Tax Court that this case is like *Commissioner v. Buck, 2 Cir., 120 F. 2d 775* or otherwise within the *Clifford* doctrine. The trust here is a long-term trust, and, as we said in the *Buck* case, the control over the income exercised by the grantor must be 'very substantial' in such circumstances if the income is to be considered his."

In *Commissioner v. Katz, 139 F. 2d 107*, the Seventh Circuit considered a long time trust where the grantor was trustee with broad powers of management. It held the income not taxable to the grantor, saying:

> "On the other hand, in the instant case both the income and corpus, due largely to the long term nature and indefinite existence of the trust, amount to a final disposal which may be characterized as permanent. In *Clifford*, the trust property was to be returned to the donor in a comparatively short period, while here it will never be returned, except on the contingency of revocation, hereinafter discussed in connection with Section 166."

It is respectfully submitted that the case at bar cannot be distinguished from the decisions in the other Circuits herein cited. A large amount of unnecessary litigation can be avoided by an authoritative ruling now from this Court on the question here presented.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1944

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No. 722

ESTATE OF J. B. WEIL, DECEASED; MRS. PAULINE P. WEIL, E. J. STERN, AND M. E. KILPATRICK, EXECUTORS, PETITIONERS

*v.*

COMMISSIONER OF INTERNAL REVENUE

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 31–54) are not reported. The *per curiam* opinion of the Circuit Court of Appeals (R. 415) is not yet reported.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 18, 1944. (R. 415.) The petition for a writ of certiorari was filed on De-

cember 2, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the courts below have properly held that the income from a trust created by the taxpayer for his minor daughter is taxable to him for the years 1934–1937 under Section 22 (a) of the Revenue Acts of 1934 and 1936.

STATUTES INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * *
>
> * * * * *

Section 22 (a) of the Revenue Act of 1936, c. 690, 49 Stat. 1648, is the same as Section 22 (a) of the 1934 Act.

STATEMENT

The facts as found by the Tax Court may be summarized as follows:

The taxpayer [1] and his wife, Pauline Plonsky Weil, owned all the outstanding stock of the Coca Cola Bottling Works of Nashville, consisting of 100 shares; 59 of these shares were in the name of Mrs. Weil and 41 in the name of the decedent. Mrs. Weil had acquired her shares from her husband over a period of years. (R. 32.)

On December 24, 1934, the decedent executed a statement purporting to transfer certain shares of the Bottling Works stock in trust for his daughter. Another statement purporting to modify the first statement was executed by the decedent on December 31, 1935. Neither of these statements was witnessed or sworn to. (R. 35.) The provisions of the first statement are as follows (R. 35–38):

> Know all men by these presents, That the Undersigned, Julius B. Weil, hereinafter referred to as grantor, for and in consideration of natural love and affection does hereby sell, assign, transfer and convey unto said Julius B. Weil as trustee for the use of the beneficiaries herein named, eight (8) shares of the common stock of Coca-Cola Bottling Works, a Tennessee corporation, to have and to hold said stock as trustee forever, in fee simple, for

[1] The taxpayer having died during the pendency of the proceeding in the Tax Court, his executors were substituted for him. (R. 2.) He is referred to hereinafter as the decedent.

the uses and purposes, however, hereinafter set forth.

1. It is intended that this transfer and conveyance is a gift by the said grantor, and is irrevocable, the purpose of the appointment of grantor as trustee being to hold the legal title to said stock and to invest the income and principal thereof for the benefit of the cestuis que trustent as herein provided. In so far as concerns the gift herein made to grantor's daughter, Pauline Weil, the same is intended to provide, to the extent made possible by said gift, for the care, maintenance, support and education of said beneficiary during her minority, in lieu of the furnishing to her by grantor directly of such care, maintenance, support and education as required of grantor by law.

2. Grantor has simultaneously with the execution of this instrument transferred the certificate evidencing said eight (8) shares in writing to trustee and this gift and trust shall become immediately effective upon the execution of this instrument, and the trustee having accepted the terms of the trust agrees to have said stock registered on the books of the Coca-Cola Bottling Works in accordance with said transfer and to deliver a copy of this trust agreement to Coca-Cola Bottling Works.

3. The trustee shall hold the legal title to said stock in trust for the cestuis que trustent herein named, as follows:

The income arising from said corpus during the life of Pauline Weil (grantor's daughter) shall become the property of and be held for the benefit of said Pauline Weil as herein provided. Upon the death of Pauline Weil, the corpus herein set up shall become the property of and be distributed equally among the natural children of said Pauline Weil, living at her death, upon their reaching the age of twenty-one (21), provided, however, if said Pauline Weil die leaving no natural living children, the entire corpus shall then become the property of grantor's present wife, Pauline Plonsky Weil, or if she be then dead, the corpus shall become the property of any religious or charitable organization to be selected by the then acting trustee hereunder, unless grantor be the trustee at said time, in which event the selection shall be made by Harold Hirsch of Atlanta, Georgia, if living, otherwise by E. J. Stern, if living, otherwise by the Court having jurisdiction of trust estates in Davidson County, Tennessee.

4. Should the trustee die or become incompetent or unable for any reason to continue as trustee hereunder, the successor trustee shall be Mrs. J. B. Weil, wife of the trustee herein named, and if she be dead or for any reason unable to or refuse to accept the trust, Harold Hirsch of Atlanta, Georgia, shall name a trustee, and if he be dead or unable for any reason to make

such appointment, the same and all subsequent appointments shall be made by the court having jurisdiction of trust estates in Davidson County, Tennessee.

5. The trustee herein appointed and any successor trustee shall have the right and power to (a) vote said stock at all meetings of the stockholders; (b) to exchange or sell said stock at public or private sale, without notice or court order of any kind in connection with any merger, consolidation other corporate reorganization of any kind whatsoever affecting said company or any successor thereof; (c) to collect all dividends of every nature whatsoever and to invest and reinvest said funds or other income as in the sole discretion of the trustee is advisable and is to the best interest of the cestuis que trustent, and in so investing and reinvesting, the trustee shall not be limited to investments authorized by the laws of the State of Tennessee or of any other state for investment by trustees, but shall invest in any stock, bond, or other security, real estate or other property of whatever nature as is deemed advisable by the trustee.

6. Stock dividends shall remain a part of the corpus of this trust.

The trustee shall also have the following powers, namely:

7. To borrow on said stock for the benefit of the cestuis que trustent and to pledge said stock or any part thereof, or said

corpus if the form thereof be changed as herein provided, as collateral on loans whenever in the discretion of the trustee it is to the best interest of the cestuis que trustent;

8. To sell said stock for the benefit of the cestuis que trustent at public or private sale without notice and without any order of court, at any time when such sale of said stock or any part thereof is to the best interest of the cestuis que trustent, and to invest and reinvest the corpus as in the discretion of the trustee is deemed best, the trust being authorized to invest such corpus and reinvest it in any property or security of any nature whatsoever whether or not authorized under the laws of the State of Tennessee or of any other state.

9. Notwithstanding the power herein given to the trustee to invest and reinvest the income and the corpus, the trustee is authorized to use such portion of the income and principal as is necessary for the support and maintenance, including education, of PAULINE WEIL (grantor's daughter), and of the natural children of PAULINE WEIL if she die leaving such children; the trustee to be the sole judge as to the amounts to be so expended, all income arising from the corpus during the life of PAULINE WEIL over and above the amount of income used for the support, education and maintenance of PAULINE WEIL to be the sole property of PAULINE WEIL and to

> be delivered to her upon her reaching the age of thirty (30) years.
>
> 10. The powers given to the trustee herein appointed shall extend to all successor trustees hereunder and the trustee herein named and all successor trustees are relieved from giving any bond of any nature whatsoever now or hereafter required of trustee under the laws of the State of Tennessee or of any other state, from taking any orders of court as a condition precedent to the execution of any power given, or from making any reports, inventories, or returns of any nature whatsoever now or hereafter required under the laws of any state.

The provisions of the second statement are as follows (R. 39):

> WHEREAS, on the twenty-fourth day of December, 1934, the undersigned did execute a trust to himself as trustee for eight (8) shares of common stock of COCA-COLA BOTTLING WORKS, a Tennessee Corporation; and
>
> WHEREAS, it is the desire of all parties concerned to amend said trust, the said trust, with the consent of all parties, is hereto [sic] amended, as follows:
>
> Under paragraph 9, the trustee is no longer authorized to use any portion of the income and principal to perform any legal obligation that I, the grantor, as father of the cestuis que trustent PAULINE WEIL, am obligated to perform, and the trust is there-

> fore amended by eliminating that portion of paragraph 9 which provides that the trustee is authorized to use such portion of the income and principal as is necessary for the support and maintenance, including education, of PAULINE WEIL, it being the intention and purpose of this amendment to eliminate the use of either income or principal for the performance of any legal duty that I owe my daughter, PAULINE WEIL, the cestuis que trustent hereunder.

On the same day that the decedent created his trust, his wife created a similar trust in 25 shares of the Bottling Works stock for their daughter. (R. 40.) This trust, however, was not amended as decedent's was on December 31, 1935. (R. 51.) The Tax Court's decision with respect to it is not involved in these review proceedings.

During the taxable years involved the trust instruments here in question were kept in a safety deposit box in the name of J. B. Weil, trustee. During part of the time after the creation of the trusts this box also contained securities and documents which were the individual property of the decedent and his wife. At a later time, undisclosed by the record, these were removed. (R. 40.)

A trust account was set up on the books of the Bottling Works in the latter part of 1934 by the bookkeeper who at the time had not seen the "trust instrument". He did not know exactly what the trust account was, understanding only

that there was a trust for the daughter of the Weils. Until an audit was made in 1937 the only record of the trust income was on the books of the Bottling Works, and personal accounts of the decedent and his wife also appeared on the same books. The decedent gave no instructions to the bookkeeper as to the trust account, but since the bookkeeper had heard of the trusts for the daughter he opened such an account on the Bottling Works' books and made various entries therein in the years 1934 to 1937, but these entries represented only his notion of what should be entered into the trust account. At times some of the individual expenses of both the decedent and his wife were charged to this account. (R. 40-41.)

The decedent had a long-established practice of handling his own financial matters through the Bottling Works. (R. 42.) In 1935 the decedent became ill in Europe. He returned in the fall of that year, was stricken with paralysis in January 1936, and probably some time later in that year instructed the bookkeeper that the living expense entries had been improperly made in the trust account. On January 2, 1936, the decedent had withdrawn by check signed "Pauline Weil, by J. B. Weil" the entire amount of a savings account in the name of Pauline Weil, $23,500, and placed it to his personal credit on the books of the Bottling Works. (R. 41.) In February 1937 one Blair, a certified public accountant, was instructed

by the decedent's counsel to set up separate trustee books. An audit was made from the books of the Bottling Works as explained by the company's bookkeeper, and after the entries were made up the decedent's counsel was consulted for his approval before the trustee books were opened. (R. 41.)

The Commissioner determined (R. 12–19), and the Tax Court held (R. 46–50), that the income from this trust for the years 1934 to 1937 was taxable to the decedent. The Circuit Court of Appeals affirmed. (R. 415.)[2]

## ARGUMENT

1. This case does not present any particularly novel or important question in the application of the principles of *Helvering* v. *Clifford,* 309 U. S. 331, but is well within the doctrine of that case. While it is true that this was not a short term trust, the length of the term is but one of the factors to be considered in problems of this nature. *Helvering* v. *Stuart,* 317 U. S. 154. In a number

[2] Several other unrelated issues which were originally involved are no longer in the case: (a) Upon the question whether a distribution by the Bottling Works of stock in March Investment Corporation was taxable as a dividend in 1934, the Tax Court ruled against the Commissioner (R. 42–46), the Circuit Court of Appeals affirmed (R. 415), and the Government does not intend to seek certiorari; (b) upon the question whether the proceeds of the sale of certain American Tobacco Company stock were taxable to Weil personally, the Tax Court's ruling (R. 52–54) was not made the subject of appeal to the Circuit Court of Appeals.

of cases the *Clifford* doctrine has been held applicable despite the absence of the short term. *Downie* v. *Commissioner*, 133 F. 2d 899 (C. C. A. 6th); *White* v. *Higgins*, 116 F. 2d 312 (C. C. A. 1st); *Commissioner* v. *Buck*, 120 F. 2d 775 (C. C. A. 2d); *Commissioner* v. *Brown*, 122 F. 2d 800; 131 F. 2d 640 (C. C. A. 3d), certiorari denied, 318 U. S. 767; *Foerderer* v. *Commissioner*, 141 F. 2d 53 (C. C. A. 3d); *Williamson* v. *Commissioner*, 132 F. 2d 489 (C. C. A. 7th). Although the discretionary power of the trustee to apply the income and principal of the trust estate to the support and maintenance of the primary beneficiary prior to the amendment of the trust instrument in December, 1935, is not in itself determinative of the taxability of the trust income to the decedent since the amendment of Section 167 of the Internal Revenue Code by Section 134 of the Revenue Act of 1943, it is still a factor to be taken into account in determining whether, during the years 1934 and 1935, the grantor had retained such complete control of the trust as to leave him still in effect the owner of the income. S. Rep. No. 627, 78th Cong., 1st sess., pp. 68–69; H. Rep. No. 871, 78th Cong., 1st sess., p. 51. Here the creation of the trust in fact worked very little change in the decedent's relationship to his business or to his family either before or after the amendment of the trust instrument, and taxation of the trust income to him comports with the realities.

The decedent, as trustee, retained the same complete powers of management and investment of the trust property as he had had before, and it is highly significant that the corpus of the trust consisted of shares of stock in a business which was essentially a one-man affair conducted by him, in which he retained power to vote the stock and dispose of it in his sole discretion.[3] No effective method of securing observance of the trust interest in the business was established. The decedent, moreover, continued his previous practice of loosely handling personal financial matters through the corporation, without adequate provision for safeguarding the trust estate. For example, he forthwith applied against his personal indebtedness the proceeds of a dividend in American Tobacco stock which had been distributed by the Bottling Works, although according to the records of the transactions relating to that stock he had received it as trustee. (R. 41–42.)

Not only did the creation of the trust work little change in the decedent's relationship to his business, but it was equally without substantial effect with respect to his control over his daughter's purse strings. The daughter was 15 years old at the time of the creation of the trust[4] and

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[3] The *Stuart* case emphasizes the importance of this factor.

[4] Since she was 22 on October 26, 1941 (R. 101), she was only 15 years old at the time the trust was created on December 24, 1934.

he retained the power to accumulate the income of the trust until she reached the age of 30. During that period she could receive the benefit only of so much of the income of the trust as the decedent decided to let her have, and no more. Although the power to change beneficiaries was not retained, the income remained within the "intimate family group" and the decedent controlled its use. Cf. *Commissioner* v. *Buck, supra,* and *Commissioner* v. *Brown, supra.*

As an added factor showing that the creation of the trust worked no substantial change in the decedent's position, the Tax Court pointed out (R. 49) that the trust came very close to being entirely without reality in that in practice very little regard was shown for its strict execution. See *Rands* v. *Commissioner,* 34 B. T. A. 1107, appeal dismissed, 101 F. 2d 1018 (C. C. A. 6th). In this connection it should be noted that the Tax Court did not rest its conclusion with respect to the loose administration of the trust solely upon the fact that improper use had been made of the daughter's funds (cf. Pet. 4, 7), but also upon the initial failure to set up a separate account for the trust (R. 40, 49). And while the decedent's illness in England was offered as an explanation for the improper transactions, no explanation was offered for the failure to establish a separate account for the trust upon its creation.

2. Conflict is alleged with *Commissioner* v. *Branch*, 114 F. 2d 985 (C. C. A. 1st); *Plimpton* v. *Commissioner*, 135 F. 2d 482 (C. C. A. 1st); *Phipps* v. *Commissioner*, 137 F. 2d 141 (C. C. A. 2d); *Commissioner* v. *Katz*, 139 F. 2d 107 (C. C. A. 7th); and *Armstrong* v. *Commissioner*, 143 F. 2d 700 (C. C. A. 10th). These cases, however, involve varying fact situations and in none of them are the facts significantly similar to those here presented. None of these cases holds that the length of term of the trust is the decisive consideration or that the income from a long term trust cannot be taxed to the grantor under Section 22 (a). As the cases cited on p. 12, *supra*, show, the First, Second and Seventh Circuits, as well as the Third and Sixth, have in proper cases held the *Clifford* doctrine applicable to long term trusts.

3. The memorandum opinion of the Circuit Court of Appeals does not disclose whether the court regarded the question here involved as one of fact, upon which the Tax Court's conclusion should be affirmed if supported by substantial evidence, or as one of law. If the latter, not only is the result below right as a matter of law, but there is no conflict with the decisions of other circuits, in view of the factual differences among the cases. In other circuit courts of appeals decisions (e. g., that in *Armstrong* v. *Commissioner*, *supra*) Tax Court decisions in cases of this type have occasionally been reversed upon the ground

that the question was one of law and had been wrongly decided. A conflict of rationale and a possible conflict of result may be said to exist between those cases and the present one, if the court below regarded the question as one of fact. This, however, is speculative. The Tax Court's conclusion is right, is amply supported by evidence, and was correctly affirmed by the court below. No significant conflict, if any at all, is present.

## CONCLUSION

The judgment below is correct and there is no occasion for review by this Court. The petition should be denied.

Respectfully submitted.

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